Fugazy Continental Corp.; Elite Services, Inc. *and* Amalgamated Local Union 355

Ganser's Auto Service, Inc. *and* Amalgamated Local Union 355

Fugazy Continental Corp. *and* Amalgamated Local Union 355, Petitioner. Cases 29-CA-6459, 29-CA-6575, and 29-RC-4144

December 16, 1982

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 16, 1981, Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, Respondent[1] filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We conclude that the Administrative Law Judge incorrectly resolved three issues presented by this case. Contrary to the Administrative Law Judge, we find, first, that it is unnecessary to base Respondent's obligation to recognize and bargain with the Union on a *Gissel* analysis,[4] since the Union has demonstrated majority support among Respondent's employees in a properly conducted and valid Board election; second, that the sale of Fugazy Continental Corporation to Stefan Ganser and Ronald Marra was not a bona fide transaction and that Ganser's Auto Service is, for the purpose of this proceeding, the *alter ego* of Fugazy Continental Corporation; third, that Fugazy's denial of vacation benefits to its employees was motivated by discriminatory reasons and therefore violated Section 8(a)(3) and (1). These issues will be discussed in turn.

On May 31, 1978, the Board conducted a representation election among Respondent's employees. The revised tally of ballots showed 10 votes for Amalgamated Local Union 355, 1 vote for Local 819 of the Teamsters, no votes against the participating labor organizations, 6 sustained challenges, and 3 nondeterminative ballots. No impediment to the results of this election has been demonstrated and, accordingly, we shall certify Amalgamated Local Union 355 as the bargaining representative inasmuch as it received a majority of the valid votes cast in the election held on May 31, 1978. Therefore, Respondent Fugazy's duty to recognize and bargain with Amalgamated Local Union 355 commenced as of that date. Under these circumstances, a *Gissel*-type bargaining order would be superfluous.

As noted above, we find that the sale of Fugazy Continental Corporation to Stefan Ganser and Ronald Marra was not a bona fide arm's-length transaction and that, for the purpose of this proceeding, Ganser's Auto Service is the *alter ego* of Fugazy Continental Corporation. The record convincingly demonstrates that the sale was a hastily and haphazardly arranged maneuver to continue Fugazy's operations in a disguised form while avoiding its obligations and responsibilities under the Act.

In determining whether Ganser's Auto Service is the *alter ego* of Fugazy, we must consider a number of factors, no one of which, taken alone, is the *sine qua non* of *alter ego* status.[5] Among these factors are: common management and ownership;[6] common business purpose, nature of operations, and supervision;[7] common premises and equipment;[8] common customers, i.e., whether the employers constitute "the same business in the same

[1] Herein also referred to as "Fugazy" or "Fugazy Continental Corporation."

[2] Respondent Fugazy has filed a motion to reject the General Counsel's cross-exceptions as untimely filed. The General Counsel opposes this motion. It is undisputed that the cross-exceptions were sent from New York, New York, by certified mail bearing a postmark date of May 12, 1981, three days in advance of the May 15, 1981, deadline. The cross-exceptions were not received by the Board in Washington, D.C., until after the deadline. Under the circumstances, we find that the cross-exceptions were mailed in reasonable time for the General Counsel to have expected timely receipt. In addition, we note that Respondent Fugazy had adequate time in which to answer the cross-exceptions and has not shown that it was prejudiced by their late receipt. Accordingly, we deny Respondent Fugazy's motion.

[3] Respondent Fugazy has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[5] *N.L.R.B.* v. *Tricor Products, Inc.*, 636 F.2d 266, 269 (10th Cir. 1980), affg. 239 NLRB NLRB 65 (1978); *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976).

[6] *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

[7] *Crawford Door Sales, supra; Farmingdale Iron Works, Inc.*, 249 NLRB 98, 106 (1980).

[8] *Davis Industries, Inc.*, 232 NLRB 946 (1977); *J. M. Tanaka Construction, Inc.*, 249 NLRB 238 (1980); *SFS Painting & Drywall, Inc.*, 249 NLRB 111 (1980).

market";[9] as well as the nature and extent of the negotiations and formalities surrounding the transaction.[10] We must also consider whether the purpose behind the creation of the alleged *alter ego* was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.[11]

It is beyond dispute that the sale was accompanied by highly irregular practices, including the lack of a formal purchase agreement until 2 months after the sale had purportedly taken place, indicating that it was not an arm's-length transaction. Among other irregularities is the fact that, although Fugazy sold its entire inventory to Ganser's Auto Service, no inventory list and no bill of sale for the inventory were ever prepared. Moreover, the timing of the sale, which Fugazy contends took place on or about June 1, just 1 day after its employees had voted their support for Local 355, must raise a strong suspicion that it was not the product of legitimate business considerations but was, instead, the culminating act in Fugazy's unlawful campaign to deprive its employees of their statutory rights. Upon close examination, we are convinced that this suspicion is borne out by the record.

We turn first to the chain of events that led to and surrounded the sale. Local 355 began its organization drive in February 1978.[12] In mid-March, Local 355 held meetings with Fugazy's employees and distributed authorization cards. On March 17, eight signed authorization cards for Local 355 were presented to Fugazy. A demand for recognition was also made at this time. This demand was refused by Fugazy on March 20 and an election petition was filed by Local 355 on the following day.

Fugazy initiated its illegal campaign against Local 355 and its supporters in early April, engaging in, *inter alia*, repeated threats of discharge for protected activities, interrogations, solicitations for a rival union, and threats to close its operations unless the employees withdrew their support for Local 355. These unlawful acts are well documented in the record and set forth in the attached Decision of the Administrative Law Judge.

On May 31, an election was conducted by the Board, the results of which showed Local 355 to have the support of a majority of Fugazy's employees. On the day following this election, Fugazy sent identical letters to Local 355 and the rival Union, Teamsters Local 819, informing them that it would cease its service shop operations as of June 12, pursuant to a purchase agreement with Stefan Ganser and Ronald Marra, supervisors who were active participants in Fugazy's campaign of unfair labor practices. The employees were then told that the shop would close on Friday, June 9. As promised, Fugazy discharged all its employees on that day. Ganser informed the employees that he would be taking over the shop and that he could hire whomever he pleased.

Ganser commenced running the shop as Ganser's Auto Service on the following Monday. He hired only one of Fugazy's employees, Samuel Davis, who had not signed an authorization card for Local 355.

Although Fugazy informed its employees on June 1 that a purchase agreement had been reached with Ganser and Marra, no formal agreement to purchase had been entered into at that time. Ganser did not sign a purchase agreement until June 26, nearly 2 months after the sale purportedly took place. Fugazy did not sign the agreement until August 10. We note, in this regard, that the parties to the transaction did not choose to bind themselves to it with their signatures until proceedings had been initiated against them and the issue of *alter ego* was raised by the General Counsel.

We consider it significant that Fugazy directed and managed *both* ends of the transaction and continues to retain a financial interest in Ganser's Auto Service. Fugazy, not Ganser, solicited Ronald Marra's participation as a partner in Ganser's Auto Service. Fugazy, not Ganser, insured the operations and employees of Ganser's Auto Service until mid-August. Fugazy, not Ganser, continues to assume direct responsibility for Ganser's Auto Service's electric bills, secretaries, guards, and bill collectors. The belatedly signed purchase agreement provides that Ganser's Auto Service will maintain and repair all vehicles owned, leased, or operated by Fugazy at its Queens Village location and that Ganser's Auto Service will return 8 percent of its gross receipts on these operations to Fugazy. The agreement even goes so far as to specify the days and hours which Ganser's Auto Service must be open. The umbilical relationship between Fugazy and Ganser's Auto Service is further demonstrated by the fact that, until proceedings began in this case, *all* of Ganser's Auto Service's business consisted of work for Fugazy; since November 22, 1978, Ganser's Auto Service has performed work for outsiders on a small scale. It is clear that Ganser's Auto Service "virtually exists at

[9] *International Harvester Co. and Muller International Trucks, Inc.*, 247 NLRB 791 (1980); *Crawford Door Sales, supra.*

[10] *Flite Chief, Inc.*, 230 NLRB 1112 (1975); *Scott Printing Corp.*, 237 NLRB 593 (1978).

[11] *Southport Co.* v. *N.L.R.B.*, 315 U.S. 100, 106 (1942); *Regal Knitwear Co.* v. *N.L.R.B.*, 324 U.S. 9, 14 (1944). See also *House of Koscot Development Corp.* v. *American Line Cosmetics, Inc.*, 468 F.2d 64, 66 (5th Cir. 1972), wherein the court stated the traditional *alter ego* rule that it would "pierce the corporate veil" when "necessary to prevent injustice."

[12] All events are in 1978 unless otherwise indicated.

the sufferance" of Fugazy Continental Corporation.[13]

We believe that the Administrative Law Judge has relied too heavily on the financial losses that Fugazy sustained in the operation of its service shop. While we do not reject his finding that losses were sustained, we find that the General Counsel has shown that the sale was not motivated by these losses and would not have taken place but for Fugazy's desire to crush the successful organizing efforts of its employees. Fugazy's animus toward the statutory rights of its employees is demonstrated on nearly every page of this record and is among the factors which tip the balance in favor of our finding of *alter ego*.[14] Moreover, Fugazy's contention that its sale to Ganser and Marra was long contemplated and motivated by legitimate business considerations is inconsistent with its maintenance of its extensive and ferocious antiunion campaign of unfair labor practices up to and beyond the time of the alleged sale. We conclude that Fugazy did not intend to sell its service shop operations until and unless it became the only remaining means to thwart the organization of its employees. Even at that point, which occurred immediately after Local 355's election victory, Fugazy did not seek an arm's-length transaction with a good-faith purchaser, but, instead, set up one of its trusted supervisors as its surrogate, carrying on the same business, in the same location, with the same supervisors, for the benefit of the same party, Fugazy itself.

We further note, in this regard, that Ganser, acting as Fugazy's foreman repeatedly stated to the employees that Fugazy would not "have" Local 355 in the shop but would rather close it down and get rid of the employees; on June 9, Ganser acting as Fugazy's foreman terminated all employees; and on June 12, Ganser operating the business as Ganser's Auto Service refused to reinstate all but one of the discharged employees.

Based upon our consideration of all the factors outlined above, we conclude that Ganser's Auto Service is the *alter ego* of Fugazy Continental Corporation and, as such, is obligated to recognize and bargain with Local 355 as the exclusive collective-bargaining representative of its employees and has violated Section 8(a)(5) of the Act by engaging in a bad-faith effort to avoid that bargaining obligation.[15] In addition, we find that the discharge of employees and refusal to reinstate them pursuant to Respondent Fugazy Continental Corporation's sham transaction with Ganser's Auto Service was designed to retaliate against those employees for their union activities and violated Section 8(a)(3) and (1) of the Act.

Lastly, we conclude that Fugazy violated Section 8 (a)(1) and (3) by its denial of accrued vacation pay to its employees. The record shows that by virtue of a companywide memorandum on February 17, 1978, Fugazy established a policy of 2 weeks' vacation pay after 1 year of employment.[16] This policy had been carried out in practice until Fugazy's sham transaction with Ganser and Marra led to the discriminatory discharge of Fugazy's employees. At the time of the discharges, Fugazy failed and refused to make such payments to the discriminatees. We conclude that the record requires a finding that Fugazy's denial of vacation pay to the discriminatees was part and parcel of its illegal campaign and an attempt to punish its employees for their support of the Union. Thus, we find that Fugazy violated Section 8(a)(1) and (3) when it contravened its own avowed and established policy regarding vacation pay and denied such pay to the discriminatees.

Inasmuch as we have found that Ganser's Auto Service is the *alter ego* of Fugazy, that Respondent Fugazy's bargaining obligation is based on a Board-conducted election, and that Respondent Fugazy's denial of vacation pay to its discriminatorily discharged employees violated Section 8(a)(3) and (1) of the Act, we shall substitute the following Conclusions of Law, Remedy, Order, and notice for those of the Administrative Law Judge, in addition to the inclusion of the Certification of Representative.

CONCLUSIONS OF LAW

1. Respondent Fugazy Continental Corp.; Elite Services, Inc., and Respondent Ganser's Auto Service, Inc., are employers engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Local Union 355 and Local 819, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Ganser's Auto Service, Inc., for the purpose of this proceeding, is the *alter ego* of Respondent Fugazy Continental Corp.

[13] *Farmingdale Iron Works, Inc., supra* at 106.

[14] *Gorwin Corp.*, 153 NLRB 664, 667–668, enfd. as modified 347 F.2d 295 (D.C. Cir. 1967); *N.L.R.B.* v. *Dan River Mills*, 274 F.2d 381, 384 (5th Cir. 1960).

[15] In light of our finding that Fugazy did not actually close, but continued operations in its *alter ego* status, we need not consider whether its failure to bargain with the Union about the sham sale also violated Sec. 8(a)(5).

[16] The memorandum stated, in pertinent part, "any employee who has been employed for a period exceeding 12 months will be entitled to 2 weeks vacation. All employees employed for over 60 months will be entitled to a 3 week vacation."

4. All service employees at Respondent Fugazy's Queens Village shop, and that of its *alter ego* Respondent Ganser's Auto Service, including mechanics, helpers, bodymen, painters, partsmen, car washers, transporters and maintenance men, but excluding drivers, chauffeurs, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. Since May 31, 1978, Amalgamated Local Union 355 has been the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

6. By the following words and acts, Respondents interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act; by threatening to close the Queens Village shop and/or discharge the shop employees if they opted for representation by Local 355; soliciting and directing an employee to sign a card for another union and threatening him with discharge if he refused to do so; threatening employees with reprisals if they supported Local 355; informing employees that it would not accept Local 355 as their bargaining representative or negotiate with that Union; interrogating employees concerning their union activities and sympathies; impliedly promising wage increases and other benefits if the employees refrained from supporting Local 355; and instructing employees to refrain from supporting Local 355.

7. By the following acts, Respondents discriminated against their employees in violation of Section 8(a)(3) of the Act: the discharge of bargaining unit employees and thereafter failing and refusing to reinstate them; and the denial of accrued vacation pay to their discriminatorily discharged employees.

8. By failing and refusing to bargain in good faith with Local 355 as the collective-bargaining representative of their employees, in the aforesaid appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, Respondents have engaged in, and are engaging, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondents have not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondents have violated Section 8(a)(1), (3), and (5) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondents unilaterally discharged all unit employees on June 9, 1978. We will therefore order Respondents to restore the *status quo ante* by offering said individuals their former jobs or, if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings suffered by reason of the discrimination against them, by payment to them of sums of money equal to that which they normally would have earned, absent the discrimination, less net earnings during such period computed on a quarterly basis in the manner established in *F. W. Woolworth Company*, 90 NLRB 289 (1950), to which shall be added interest computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We shall also order that Respondents pay to their discriminatorily discharged employees the money equivalent to vacation time which each had accrued through June 9, 1978, but which remained unused, with interest to be computed thereon, in the manner set forth in the preceding paragraph.

We shall further order that Respondents be required to recognize and bargain with Local 355 as the exclusive bargaining representative of the employees in the unit found to be appropriate herein.

Finally, in view of the egregious nature of Respondents' conduct, we are also of the opinion that a broad order herein is warranted.[17]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Fugazy Continental Corp.; Elite Services, Inc., and its *alter ego*, Respondent Ganser's Auto Service, Inc., Queens, New York, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Local Union 355 as the exclusive representative of its employees in the following unit:

> All service employees at Fugazy's Queens Village shop, including mechanics, helpers, bodymen, painters, partsmen, car washers, trans-

[17] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

porters and maintenance men, but excluding drivers, chauffeurs, office clerical employees, guards and supervisors as defined in the Act.

(b) Threatening to close the shop and/or discharge the employees if they opt for representation by Local 355; soliciting and directing employees to sign cards in favor of another union and threatening them with discharge if they refuse to do so; threatening employees with reprisals if they support Local 355; informing employees that it will not accept Local 355 as their bargaining representative or negotiate with that Union; interrogating employees concerning their union activities and sympathies; impliedly promising wage increases and other benefits if the employees refrain from supporting Local 355; and instructing employees to refrain from supporting Local 355.

(c) Discharging or altering the job status of employees because of their union activities or other exercise of their rights under the National Labor Relations Act.

(d) Refusing and failing to pay employees their accrued vacation benefits because of their support for or membership in Local 355.

(e) In any other manner interfering with, restraining, or coercing their employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain in good faith with Local 355 as the exclusive bargaining representative of all employees in the appropriate unit set forth above and, if an understanding is reached, embody it in a signed agreement.

(b) Offer full and immediate reinstatement to those employees who were discharged because of their union membership or activities, namely, Hendricks Ismael, Jose D. Neto, Anthony Polidoro, James Scotti, Peter Seale, Dominick Serzo, Encanacion Vallalta, Errol Wehby, and Errol Wilson, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; make whole those employees for their loss of earnings and benefits including accrued vactation pay, due to Respondents' unfair labor practices described previously; and pay to those employees appropriate interest on those amounts of money, as more fully described in the section of this Decision entitled "Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities and offices located in New York City, and mail to the discharged Queens Village shop employees, at their last known addresses, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' representative, shall be posted by and mailed by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Amalgamated Local Union 355, and that pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all employees in the unit found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Amalgamated Local Union 355 as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT threaten to close the Queens Village shop and/or discharge the employees if they opt for representation by Local 355; solicit or direct employees to sign cards in favor of another union and threaten them with discharge if they refuse to do so; threaten em-

ployees with reprisals if they support Local 355; inform employees that we will not accept Local 355 as their bargaining representative or negotiate with that Union; interrogate employees concerning their union activities and sympathies; impliedly promise wage increases and other benefits if the employees refrain from supporting Local 355; instruct employees to refrain from supporting Local 355.

WE WILL NOT deny vacation pay benefits to employees because of their membership in or activities on behalf of Local 355.

WE WILL NOT discharge employees because of their membership in or activities in support of Local 355.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain in good faith with Local 355, as the exclusive bargaining representative of all employees in the appropriate unit described below, and, if an understanding is reached, we will embody it in a signed agreement. The unit is:

> All service employees at the Queens Village shop, including mechanics, helpers, bodymen, painters, partsmen, car washers, transporters and maintenance men, excluding drivers, chauffeurs, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer those employees who were unlawfully discharged because of their membership in or support of Local 355, namely, Hendricks Ismael, Jose D. Neto, Anthony Polidoro, James Scotti, Peter Seale, Dominick Zerzo, Encaracion Vallalta, Errol Wehby, and Errol Wilson, full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole those discharged employees for their loss of earnings and benefits due to our actions, with interest.

WE WILL pay to those employees who were unlawfully discharged because of their membership in or support of Local 355 the accrued vacation benefits due them, which we withheld from them, with interest thereon.

FUGAZY CONTINENTAL CORP.; ELITE SERVICES, INC.; GANSER'S AUTO SERVICE, INC.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed on June 12 and July 28, 1978, by Amalgamated Local Union 355, herein called Local 355, against Fugazy Continental Corp.; Elite Services, Inc.,[1] herein called Respondent Fugazy, and Ganser's Auto Service, Inc., herein called Respondent Ganser, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint dated July 31, 1978, and an order consolidating cases and amended complaint dated October 24, 1978. The consolidated complaint alleges violations by Respondents of Section 8(a)(5), (3), and (1) of the National Labor Relations Act, as amended, herein called the Act. Respondents, by their answers, denied the commission of any unfair labor practices. On October 24, 1978, the Regional Director ordered that Case 29-RC-4144 be consolidated with the unfair labor practice cases for purposes of hearing, ruling, and decision by an Administrative Law Judge.

Pursuant to notice, a hearing was held before me in Brooklyn, New York, on April 4, May 14 through 17, June 26 through 29, and November 13, 1979, at which the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the General Counsel and Respondent Fugazy filed briefs which have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Fugazy has offices and places of business at various locations in New York City, including the Queens Village locale, in Queens, New York. It is engaged in providing limousine and other transportation services and in performing motor vehicle repair work. During the year preceding issuance of the amended complaint, a representative period, Respondent Fugazy, in the course and conduct of its business operations, derived gross revenues therefrom in excess of $500,000. In that same time period, it purchased and received, at its Queens Village location, goods and materials valued in excess of $50,000 which were sent directly from points located outside the State of New York. I find that Respondent Fugazy is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Fugazy Continental Corp., a Delaware corporation, and Elite Services, Inc., a New York corporation, are, and at all times material herein have been, affiliated businesses with common ownership, officers, directors, and operators, and constitute a single integrated business enterprise. The directors and operators formulate and administer a common labor policy for the aforenamed companies, affecting the employees of those companies. The parties have stipulated, and I find, that the two companies constitute a joint employer.

Respondent Ganser, a New York corporation, has, since June 12, 1978, engaged in the auto repair and body shop business at the above-referenced Queens Village, locale. During the period June 12, 1978, through April 16, 1979, it performed services for Respondent Fugazy and its employee drivers valued in excess of $174,000. I find that Respondent Ganser is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

Local 355 and Local 819, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 819, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES[2]

A. *Background*

Until June 9, 1978, Respondent Fugazy, at the Queens Village, location, operated an automobile service and body shop where cars owned or leased by this Respondent, its related corporations, and those driven by owner-operators or franchisees were repaired. The shop did not do business with "outside" customers. Some 50 feet from the service shop, in a separate enclosure, Fugazy maintained a used-car showroom and offices for sales and security employees. Adjacent to that building was Fugazy's outdoor used-car lot where, *inter alia*, the drivers of leased vehicles reported.

As of March 1978, Respondent Fugazy employed, in its above-referenced service shop, mechanics James Scotti, Dominick Serzo, Jose Neto, and Anthony Polidoro; body shop employees Hendricks Ismael, Earl Wilson, Peter Seale, and Encarnation Villalta; parts employee Errol Wehby and yardmen Cornelius Covington and Anthony Grant.[3] The mechanics worked under Stefan Ganser; the body shop employees under John Rizzo and, later, Ronald Marra; the yardmen under Kenneth Austin. Those individuals reported to Vice President Joseph Harkowa who, in turn, reported to Vice President William D. Fugazy, Jr.[4]

Local 355 began its organizing drive among the Fugazy employees in February 1978. At a meeting held on March 16, 8 of the 11 shop employees, Scotti, Serzo, Neto, Polidoro, Ismael, Wilson, Seale, and Villalta, signed cards authorizing the Union to represent them for purposes of collective bargaining.[5] Those cards were presented to Harkowa on March 17, by Local 355 Business Agent Marvin Raphael, in support of the Union's demand for recognition. When that was declined, on March 20, Raphael, on March 21, filed a petition with the Board in Case 29-RC-4144. At or about that time, Scotti advised Ganser that the employees had "signed for Local 355." By early April, 9 of the 11 shop employees had advised Marra that they were "in favor of" Local 355.

Pursuant to a Decision and Direction of Election issued by the Regional Director on May 5, an election was conducted by the Board on May 31 in a unit of all service employees, including mechanics, helpers, bodymen, painters, partsmen, car washers, transporters, and maintenancemen at the Queens Village locale, excluding drivers, chauffeurs, office clerical employees, guards, and supervisors as defined in the Act. Following the election, on Friday, June 9, 1978, Respondent Fugazy discharged its service employees and ceased to conduct the service operation. On Monday, June 12, pursuant to his purchase arrangement with Respondent Fugazy, Stefan Ganser, along with Ronald Marra, commenced business at the same location as Ganser's Auto Service, Inc. Respondent Ganser conducted, essentially, the same shop operation previously run by Fugazy but hired a different employee complement.

Following the filing of charges which gave rise to the instant unfair labor practice proceeding the Regional Director, on July 14, ordered that the representation case record be reopened to receive evidence concerning the change in ownership; the relationship between Respondent Fugazy and Ganser and Marra; and the status of the unit. Accordingly, a postelection hearing was conducted on July 25 and on August 7 and 11. Meanwhile, the original complaint in this matter issued on July 31. On October 24, the Regional Director issued a revised tally of ballots showing 10 votes cast for Local 355; 1 vote for Local 819; no votes against participating labor organizations; 6 sustained challenges of ineligible voters; 3 undetermined and nondeterminative challenged ballots. Also on that date, and despite having developed a full representation case record concerning the transfer of ownership, the Regional Director, by consolidation, referred decision on this matter to the administrative law judge assigned to hear the unfair labor practice cases.[6]

In the instant case, the General Counsel contends, and Respondents deny, that Respondent Ganser has, since June 1978, operated the shop as the successor to, and/or the *alter ego* of, Respondent Fugazy. It is further alleged that Respondents violated Section 8(a)(3) of the Act by the June 9 discharge of the shop employees, and the fail-

[2] The fact findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at the hearing. Where necessary to do so in order to resolve specific testimonial conflict, credibility resolutions have been set forth, *infra*.

[3] On April 22, 1978, Seale and Villalta were placed on temporary layoff status. In mid-May, Covington and Grant were transferred to other Fugazy locations and, in late June, they were discharged. For the 2- to 3-month period ending May 1978, Clyde Utley and John Kilgore worked as helpers. The record evidence reflects that they were hired and worked as temporary employees. In late March, or early April, Willard McLaughlin was hired as a mechanic. He left his job in May and mechanic Samuel Davis was hired.

[4] The record evidence reflects that Fugazy, Harkowa, and Austin had authority to hire and fire, and that Ganser, Rizzo, and Marra responsibly directed employees in their work. I find that those six individuals were, at all times material herein, supervisors of Respondent Fugazy within the meaning of the Act.

[5] Wehby signed such a card on or about the same date. On April 7, following his hire, McLaughlin signed a card. Cards purportedly signed by Covington and Grant, in mid-April, have not been properly authenticated.

[6] Respondents contend that the Regional Director thus utilized the postelection representation case hearing as a discovery device by which Respondents' witnesses were required to answer questions concerning alleged unfair labor practices relating to the transfer of operations. Respondents argue that, as to unfair labor practice allegations herein relating to the transfer, they have been denied due process of law.

ure to pay them vacation moneys normally due, and violated Section 8(a)(5) of the Act by refusing, since March 17, to recognize and bargain with Local 355 as the collective-bargaining representative of those shop employees. The General Counsel also argues that, in the March to June 1978 period, Respondent Fugazy violated Section 8(a)(1) of the Act by threatening employees with discharge, shop closure, and other reprisals if they supported Local 355; urging, soliciting, and directing employees to sign the membership applications of Local 819; interrogating employees concerning their union activities and sympathies; warning and directing employees to refrain from supporting Local 355; warning employees that Respondent Fugazy would never accept Local 355 as their collective-bargaining representative; offering and promising its employees wage increases and other benefits to induce them to refrain from supporting Local 355.

B. *The 8(a)(1) Allegations*[7]

At the beginning of April 1978 Supervisor Ganser signed an authorization card in favor of Local 819. On April 4 he successfully solicited the signature of Supervisor Marra on such a card. On April 5 Ganser handed a Local 819 authorization card to employee Wehby. According to Wehby's testimony, Ganser told the employee to sign the card. When Wehby objected, the supervisor stated that if he, Wehby, did not sign the card, his job would be placed in jeopardy. At that point, the employee complied with Ganser's request. Wehby further testified that, on May 31, before the election, Ganser told him to vote for Local 819. He added: "Don't vote for Local 355, or else." Ganser, in his testimony, conceded that in early April he handed a Local 819 card to Wehby, but denied making the remarks attributed to him by the employee. As indicated at footnote 7, herein, I have credited Wehby's account of the conversations of April 5 and May 31. In reliance thereon, I find that Respondent Fugazy, through Ganser, violated Section 8(a)(1) of the Act by soliciting and directing an employee to sign an authorization card for Local 819; threatening the employee with discharge if he refused to sign the card; and threatening the employee with reprisals if he supported Local 355.

According to the corroborated testimony of employee Peter Seale, Ganser, in late March, told Scotti, Ismael, Wilson, and Seale that the employees should go ahead with Respondent Fugazy's union[8] because Fugazy[9] would not allow the employees to bring a second union into the shop. Ganser added that, if the employees did bring in a second union, Fugazy would find the means to close the shop or get rid of the employees. Scotti testified that, on four or five occasions preceding the election, he was told by Ganser that Fugazy would not accept another union; would not stand for two unions; and would most likely close the shop if the employees opted for representation by Local 355. Scotti further testified that shortly before the election Ganser instructed him and employee Ismael not to vote for Local 355 or the shop might close down. Ganser, in his testimony, denied the issuance of the foregoing warnings and threats. For the reasons stated at footnote 7, I have credited Scotti's testimony and the corroborated testimony of Seale, and I find, based on their testimony, that the Respondent Fugazy, through Ganser, violated Section 8(a)(1) of the Act by informing employees that it would not accept Local 355 as their bargaining representative and by threatening employees with shop closure, discharge, and other reprisals if they selected Local 355.

Employee Polidoro testified that, on May 31, after the election, Ganser asked several employees, including Polidoro, if they were still supporting Local 355. When they replied, yes, Ganser stated: "That's all I want to know." On June 1, according to Polidoro, he was told by Ganser: "It doesn't look good for you guys." On several occasions between June 1 and 9 Polidoro testified that Ganser told the employees: "I hope you get a job." Based on the foregoing substantially uncontradicted testimony of Polidoro, I find that Respondent Fugazy, through Ganser, violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities and sympathies and by threatening discharge and other reprisals because the employees supported Local 355.

Numerous employee witnesses testified about group meetings conducted by Vice President Harkowa, in the shop, in the 2-1/2-month period preceding the election. According to Scotti, Harkowa informed the employees, at those meetings, that Fugazy Senior would not stand for two unions and would not negotiate with Local 355. The employees were advised that if they opted for representation by Local 355, the shop would probably be closed down. Harkowa further stated that the Company was looking for a different insurance plan; that things were going to get better; that the employees would be paid differently, that is, on a percentage basis. Harkowa, in his testimony, confirmed the fact of the foregoing meeting but insisted that the topic of unions was first raised by the employees. He further testified that his remarks concerning that topic were limited to the statement that he, Harkowa, did not understand why, all of a sudden, there was "the big push" for a union and that, because of certain experiences of his father, he, Harkowa, did not believe in unions. He denied making the threats and promises attributed to him by Scotti and other employees. I found Harkowa's testimony, concern-

[7] In making the findings contained in this section, I have not relied on uncorroborated testimony of employee Hendricks Ismael, who I found a vague and somewhat confused witness. I have also viewed with suspicion certain other uncorroborated testimony of employee witnesses, including that of Earl Wilson. On the other hand, I have relied heavily upon the testimony of employee James Scotti who impressed me as honest, forthright, and in possession of a relatively clear recollection of events. I also found employees Errol Wehby and Anthony Polidoro to be most believable witnesses. While I have, *infra*, credited portions of the testimony of Supervisor Stefan Ganser, relating to the transfer of operations, I was not persuaded by his denials concerning the occurrence of alleged conversations with employees, as against the detailed, convincing, contrary testimony of Scotti, Wehby, Polidoro, and others. Rather, based on demeanor impressions, I found the testimony of the above-listed employees more believable.

[8] This was a reference to Local 819, the collective-bargaining representative of the drivers employed by Respondent Fugazy.

[9] Respondent's president is William D. Fugazy, Sr.

ing the foregoing meetings, vague and evasive and, accordingly, I do not credit it. Based on Scotti's credited corroborated testimony, I find that at those meetings Respondent Fugazy through Vice President Harkowa violated Section 8(a)(1) of the Act by informing employees that it would not negotiate with Local 355; threatening to close the shop if the employees selected that union as their representative; and impliedly promising employees wage increases and other benefits if they refrained from supporting Local 355.

It is undisputed that, in late March or early April, Vice President Fugazy, Jr., and Supervisor Ganser met at the shop with employees Scotti, Ismael, and Polidoro. Several weeks later, Fugazy talked by telephone with Scotti and Ismael. There is dispute with respect to who initiated those conversations, a matter I need not resolve herein. According to Fugazy Junior's corroborated testimony, he had the face-to-face meeting tape recorded, and so informed the employees. Scotti testified that he did not see a recorder at the meeting and could not recall being advised by Fugazy Junior that the meeting was being recorded. In any event, the tape is not now in existence.

With respect to the face-to-face meeting, Scotti testified that Fugazy Junior began the meeting by asking what the problem was about. The employees explained that, for the first time, money had been deducted from their paychecks to cover the cost of hospitalization insurance. Fugazy stated that that was a misunderstanding which could be worked out. He asked why the employees desired to have a union. Scotti replied that they wanted pay increases. In response, Fugazy informed the employees that his father, Fugazy Senior, would not appreciate what the employees were doing; would not stand for another union; would probably discharge the employees. Fugazy added that it was against the law for him to talk to the employees about the Union. Scotti further testified that, during the subsequent telephone conversation, Fugazy, essentially, repeated the foregoing remarks, adding that he, Fugazy Junior, did not want the employees to vote for Local 355.

Fugazy Junior's version of the foregoing conversations was quite different. He testified that he began the in-person meeting by informing the employees that, while he would listen to what they had to say, he could not negotiate with them or discuss employment related matters, since it was illegal for him to do so after the employees had asked a union to represent them. Scotti stated that the employees were unhappy that they had sought representation and, if certain issues could be resolved, the employees would withdraw from the Union. Fugazy reiterated that he could not discuss issues pertaining to employment. According to Fugazy, during the later telephone conversation, Scotti, for the second time, offered a cessation of activities on behalf of Local 355 if Fugazy met certain demands. Fugazy Junior again refused to pursue that matter.

In resolving the foregoing credibility issue in favor of the testimony of Scotti, I have relied on factors noted at footnote 7. While, *infra*, I have credited other portions of Fugazy's testimony, I found his narration concerning the above conversations with the employees to be less persuasive and less internally consistent than the narration of Scotti. Based on that employee's testimony, I find that Respondent Fugazy, through Vice President William D. Fugazy, Jr., violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities; instructing employees to refrain from supporting Local 355; and threatening to discharge employees because of their union activities.

C. *The Transfer of Operations*[10]

From 1968 until early 1974 Respondent Fugazy based its limousine service operation at a garage located in Long Island City, New York. It engaged Larsen Ford, White Plains, New York, under an exclusive contract, to service Fugazy vehicles at the Fugazy garage. Stefan Ganser was then a supervisor employed by Larsen Ford and he, and two or three Larsen employees who worked under him, performed repair work on the Fugazy vehicles. At the beginning of 1974, Larsen relinguished its service contract with Respondent Fugazy and, at that time, Ganser incorporated as Ganser's Auto Service, Inc., and hired two mechanics. The new corporation serviced Fugazy vehicles through December 1974 when Respondent Fugazy moved to another Long Island City garage. At that time, it engaged other outside companies to handle the repair work. Ganser then opened a shop in Long Island City and, at that location, serviced certain of Respondent Fugazy's limousines. In 1976, Fugazy began, itself, to handle the repair work on its vehicles. In October 1977 Ganser closed his shop and discharged his employees. One month later, he accepted employment with Respondent Fugazy as foreman of the repair shop. In February 1978 Fugazy transferred its shop operations to the Queens Village locale. On April 3, it hired Ronald Marra to supervise the body shop employees.

Respondent Fugazy tentatively decided to sell its repair and maintenance shop in February, 1977, after it determined that, as a result of operation of that facility, it was incurring substantial losses.[11] During that year, after discussion with a number of potential purchasers, it settled on Ganser. Thus, when Ganser accepted employment with Respondent Fugazy, as a supervisor, it was with the understanding that he would purchase the facility, after the move to Queens Village, on his inspection and acceptance of the latter location.[12]

As noted, Fugazy transferred shop operations to Queens Village in February 1978 and, at that time, Ganser approved the new facility. Tentative agreement to purchase, between Fugazy and Ganser, was reached during March. Thereafter, there were ongoing negotiations concerning the details of the transaction and, during the spring of 1978 Ganser sought and obtained proper financing. In April the parties agreed that Ganser would begin operations on or about June 1, and would

[10] The factfindings contained in this section are based, primarily, on the uncontradicted testimony of William D. Fugazy, Jr., and Stefan Ganser.

[11] In April 1978 Fugazy Junior was advised by the company comptroller that losses for the preceding 15-month period, attributable to the operation of the shop, had reached $200,000.

[12] Ganser regarded the Long Island City garage as inadequate for his intended operation.

purchase the shop inventory and rent the facility and the tools.

On June 1, 1978, Fugazy Junior sent identical letters to Local 355 and Local 819, advising them that, effective June 12, Respondent Fugazy would terminate the service shop operation pursuant to a purchase agreement reached with Ganser and Marra.[13] On June 7 and 8, Harkowa and Ganser informed the 20 shop employees that the shop would close on Friday, June 9. On that day, Ganser told the departing employees that he would be taking over the shop and could hire whomever he pleased. He exchanged telephone numbers with some or all of the employees. Scotti and Serzo stated a willingness to work for Ganser. None, save Samuel Davis, were ever offered employment. Before he departed, Scotti spoke to a vice president of Respondent Fugazy and was told that the shop was being closed because of the heavy financial losses incurred as a result of its operation. At that time, Scotti requested that the departing employees receive 2 weeks' vacation pay, a request that was denied.[14]

Prior to the June 9 closing, on April 22, Respondent Fugazy temporarily laid off its body shop painters, Seale and Villalta, and, by June 9, they had not been recalled. Harkowa testified that the layoffs were necessitated by a reduction of work in the body shop, an assertion corroborated by the body shop employees. These two least senior employees in that shop were not replaced. Rather, their former painting functions were, thereafter, performed by the body repairmen, Wilson and Ismael. As Seale and Villalta continued on temporary layoff status, until June 9, with expectancy of recall, I find that they remained employees of Respondent Fugazy until that date. In May Respondent Fugazy transferred yardmen Covington and Grant to other locations from which, in late June, they were discharged. The record contains no further evidence pertaining to those transfers and the subsequent discharges and, accordingly, I find that by June 9 Covington and Grant had ceased to occupy the status of shop employees. On Saturday, June 10, following the closing, Wehby asked Respondent Fugazy's supervisor, Joseph Lubrano, if he could return to Fugazy on Monday, June 12, as a chauffeur. Lubrano agreed. However, on June 12, Vice President Nicholas Pizzuro discharged Wehby, informing him that Respondent Fugazy did not have room for an additional driver. I find the evidence insufficient to establish that Wehby's June 10 discharge was for reasons violative of the Act. I also conclude that the record evidence does not permit a finding that Respondent Fugazy denied vacation pay to the employees discharged on June 9 for discriminatory reasons.

Respondent Ganser commenced shop operations on June 12 with Ganser in charge of the repair facility and Marra running the body shop. Ganser hired Samuel Davis, Lewis Ponzini, and Roger Dunn as mechanics. Davis had previously worked under Ganser at Larsen Ford and in May 1978 had been hired by Respondent Fugazy on Ganser's recommendation. Davis was among the employees discharged by Fugazy on June 9. Ponzini had worked as an employee of Ganser's Auto Service, Inc., from 1974 until 1977. Dunn was hired on the recommendation of Davis. Ganser hired no other mechanics until January 1979 when Willard McLaughlin who, as a Fugazy employee, had worked under Ganser's supervision between April and May 1978 was hired. For the body shop, Marra hired bodyman Herman Finney, who had previously worked under Marra. Thereafter, he hired a painter, Anthony Barrone, who had no prior association with Ganser or Marra, on a trial basis.

Ganser testified that he did not offer employment to the other former Fugazy mechanics and shop employees, Neto, Polidoro, Serzo, Wheby, and Scotti, because: Neto had told him that Neto desired to work at a location closer to his home in New Jersey; Polidoro was a sloppy and inadequate worker who arrived later for work 80 percent of the time; Serzo did not have a driver's license and, also, was classified as a "B" mechanic, that is, a mechanic limited in the types of work he can perform; Wehby, the Fugazy parts man, was unfamiliar with automobile parts and consistently sold them to customers at incorrect prices; and Scotti was just a fair worker. Ganser's testimony in this regard was substantially uncontradicted and, in certain instances, was confirmed by the employees in question, for example, Wehby and Polidoro. Ganser further testified that he desired to commence operations with a small staff of grade "A" mechanics, familiar to him, and who had worked for him in the past. Marra credibly testified that he had while supervising the body shop for Respondent Fugazy found Wilson, Ismael, Seale, and Villalta to be slow, sloppy, and nonproductive workers. In this connetion, Harkowa testified that, while Ganser and Marra served as supervisors of Respondent Fugazy, they repeatedly asked Harkowa to replace the shop employees because of their inadequate work performance.

As indicated, Respondent Ganser occupies the same physical shop facility at Queens Village formerly occupied by Respondent Fugazy. The latter has maintained its separately enclosed used-car showroom and offices, some 50 feet from the shop, where a used-car salesman, a secretary, and a security man are employed. Respondent Fugazy has also retained the adjacent outdoor used-car lot where the drivers of leased vehicles continue to report.

Although Respondent Ganser assumed operation of the Queens Village shop, on June 12, Ganser did not sign its agreement with Fugazy until July 26, 1978.[15] Fugazy, Junior declined to sign the agreement and a bill of sale for parts and inventory until August 10, when Ganser presented evidence of insurance covering the mechanical facility. The agreement provides, *inter alia*, that Fugazy shall: sublease to Ganser the service area of the Queens Village locale, for a 3-year term commencing June 12, 1978, for a gross rental of $2,000 per month, including

[13] In the spring of 1978 Ganser and Marra decided that Marra would become vice president and a stockholder of Ganser's Auto Service, Inc., and would run the body shop.

[14] The record evidence reflects that Respondent did not, theretofore, have a clear and certain practice with respect to granting vacations to shop employees.

[15] The document, initially drafted in May, is dated July 26, 1978.

utilities and security services; lease to Ganser all tools and equipment located on the premises for a rental of $50 per month; sell to Ganser all inventory located on the premises;[16] retain the services of Ganser for maintnance and repair of all automobiles owned, leased, or operated by Fugazy at the Queens Village locale, to be paid for at the rate of $16 per hour for services and cost plus 15 percent for parts; use its best efforts to promote the services of Ganser to Fugazy drivers and employees; and receive, in consideration for promotion, 8 percent of the gross receipts on the repair of Fugazy and related vehicles. The agreement obligates Ganser to obtain personal liability and property damage insurance and to remain open to the public, Monday through Friday, 8 a.m. to 5 p.m. Ganser may terminate the agreement, upon 30 days' notice, if gross receipts do not equal $15,000 for any one calendar month.

From June 12 through November 22, 1978, Respondent Ganser performed its work exclusively for customers previously serviced by Respondent Fugazy. Starting on November 22, Respondent Ganser began to service, on a relatively small scale, the cars of "outside customers."

D. *The Obligation To Bargain*

As shown above, by March 17, 1978, 9 of the 11 unit employees had signed cards designating Local 355 as their collective-bargaining representative. The record evidence shows that the cards are authentic, valid designations by the signatories thereto. I find that as of March 17, 1978, when Local 355 requested and Respondent Fugazy declined to grant recognition, Local 355 had been selected as the exclusive bargaining agent by a majority of the shop employees in an appropriate unit.

Soon after Local 355 obtained its card majority, Respondent Fugazy embarked upon an extensive course and pattern of unfair labor practice conduct. Included among its unlawful activities was its repeated threats to discharge the employees and/or to close the shop if Local 355 gained representation rights, unfair labor practices of the most egregious sort, whose effects are demonstrably powerful and longlasting. Coupled with that conduct, Respondent Fugazy, as shown, *supra*, engaged in a wide variety of other serious unfair labor practice activities designed to thwart an expression of free choice by its employees. The holding of a free and fair election was thus rendered unlikely and, I conclude, employee choice, as expressed through cards, will best be protected by the imposition of a bargaining order.[17] I find and conclude that, by refusing, on and after March 17, 1978, to recognize Local 355 as the exclusive representative of its employees, in an appropriate unit, Respondent Fugazy violated Section 8(a)(5) of the Act.

Under Board law[18] Respondent Fugazy was required to bargain with Local 355, the exclusive representative of the shop employees, concerning the decision to close the shop, a small part of Respondent Fugazy's entire business operations. Respondent Fugazy was also required to bargain about the effects of such a closing on the unit employees. It failed and refused to do so[19] in violation of Section 8(a)(5).

Despite the very suspicious timing of the transaction between these Respondents, and notwithstanding the overwhelming anti-Local 355 animus displayed by Respondent Fugazy and its supervisor, Ganser, including their unlawful activities, I conclude that the General Counsel has not demonstrated, by a preponderance of credible evidence, that the transaction was not *bona fide*. In light of the uncontradicted evidence that Respondent Fugazy was sustaining very substantial losses from the operation of the shop, I find that its decision to close that segment of its business was in response to that factor, and not for the purpose of chilling unionism among its other employee groups. In view of the lengthy and intricate negotiations between Respondents, the onset of which long preceded Local 355's organizing campaign, Ganser's prior experience as a successful entrepreneur in servicing Fugazy and other vehicles, and the absence of control reserved to Respondent Fugazy, its officers, and other officials over the operation of Respondent Ganser, I conclude that Respondent Ganser was not created as the *alter ego* of Respondent Fugazy, in an effort to avoid its bargaining obligation. Rather, a complete change of ownership and control occurred. I have, further, accepted the explanations of Ganser and Marra with respect to the hiring decisions which they made, particularly in light of their task, to turn a losing operation around, which, Ganser testified, he felt was possible with a small employee complement of proven ability. I thus conclude that Respondent Ganser did not violate Section 8(a)(3) of the Act by refusing to hire the majority of the former Fugazy employees. In view of the change in employee complement, I further conclude that Respondent Ganser is not the successor to Respondent Fugazy and, so, does not have an obligation to recognize Local 355 as the bargaining agent of the new shop's employees.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent Fugazy set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent Fugazy has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since Respondent Fugazy refused to bargain in good faith about its decision to close the Queens Village shop, and the effects of that decision upon the shop em-

[16] The sale of inventory was at wholesale price.

[17] See *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[18] *Ozark Trailers, Incorporated*, 161 NLRB 561 (1966).

[19] Indeed, Local 355 was not even informed about the closing until several days before its occurrence.

ployees, I shall recommend that it be ordered to bargain in good faith with Local 355 about both the decision to close the shop and the effects of that decision. I shall futher recommend that Respondent Fugazy be ordered to make the discharged Queen Village employees whole for any loss of pay they may have suffered as a result of the unfair labor practice conduct, less net interim earnings, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). Respondent Fugazy shall pay the employees backpay, at the rate of their normal wages when last in its employ, from June 9, 1978, until the occurrence of the earliest of the following events:

(1) The date Respondent Fugazy bargains to agreement with Local 355 with respect to the decision to close the Queens Village shop, and the effects of the closing upon unit employees;

(2) A *bona fide* impasse in bargaining;

(3) The failure of Local 355 to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent Faguzy's notice of its desire to bargain with Local 355 or;

(4) The subsequent failure of Local 355 to bargain in good faith.[20]

CONCLUSIONS OF LAW

1. Respondent Fugazy Continental Corp.; Elite Services, Inc., and Respondent Ganser's Auto Service, Inc., are employers engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Local Union 355, and Local 819, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

3. All service employees at Respondent Fugazy's Queens Village shop, including mechanics, helpers, bodymen, painters, partsmen, car washers, transporters, and maintenance men, but excluding drivers, chauffeurs, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 17, 1978, Local 355 has been the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain in good faith with Local 355 as collective-bargaining representative of its employees, in the aforesaid appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, Respondent Fugazy has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing to bargain with Local 355 about its decision to close the Queens Village shop, and about the effects of that decision, Respondent Fugazy has engaged in further unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By threatening to close the Queens Village shop, and/or discharge the shop employees if they opted for representation by Local 355; soliciting and directing an employee to sign a card for another union and threatening him with discharge if he refused to do so; threatening employees with reprisals if they supported Local 355; informing employees that it would not accept Local 355 as their bargaining representative or negotiate with that union; interrogating employees concerning their union activities and sympathies; impliedly promising wage increases and other benefits if the employees refrained from supporting Local 355 and by instructing employees to refrain from supporting Local 355, Respondent Fugazy has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondents have not otherwise violated the Act as alleged in the complaint.

[Recommended Order omitted from publication.]

[20] *Production Molded Plastics, Inc.*, 227 NLRB 776 (1977).